Appendix F (Part 2)

***The Bank of New York Mellon v. Jefferson Cnty., Ala.*, No. 2:08-cv-01703**
Memorandum Opinion
(N.D. Ala. June 12, 2009)

Sewer System has been largely disengaged in any efforts to enhance revenue.[15] He is not alone. At the February 25, 2009 hearing in this case, the court explicitly directed the County not to remain disengaged, but to make a genuine response to the Special Masters' recommendations in order for the court to understand what action, if any, the County intends to take.

In response, on March 17, 2009, the County Commission passed a resolution, by a 3-2 margin which, at best, paid lip service to the directions of the court. *See* Jt. Stmt. ¶90; Jt. Ex. 73. Other than beginning the process to establish a $12, one-time private meter administration fee, the County has implemented none of the specific revenue enhancements suggested by the Special Masters. Nor has the County indicated any intention to raise sewer rates. In fact, at the June 1, 2009 hearing, the Commissioners unanimously stated they will not consider raising rates. Further, although the County has indicated it will hire a consultant, Raftelis, it has only authorized Raftelis' hiring for a very limited purpose[16] – reviewing and advising the Commission with respect to four specific items: (1) a fixed fee for sewer charges (to replace the minimum monthly fee); (2) impact fees; (3) industrial surcharge and septage rates; and (4) credit for residential customers for water not returned to the

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[15]During the period of time in which the Special Masters were developing their Report assessing the operation of the ESD, Commissioner Carns only met with them once (for about twenty minutes) and failed to discuss anything of substance. Despite the fact that he felt like he had only limited information about the Special Master process and may not have understood it, he made no effort to contact the Special Masters to receive more information or become in any way involved in the process. (*See, e.g.*, Doc. #81, Ex. 2 and 3 at 9-10, 27-28, 69, 70-71). Further, at the hearing on June 1, 2009, Commissioner Carns was an advocate of standing still (*i.e.*, offering Plaintiffs and the Liquidity Banks only net sewer revenues – which are decreasing even beyond what was budgeted for 2009), rather than developing a plan to solve his department's financial woes. This is the case despite the fact that, in 2006, before he took office and after studying the Sewer Systems finances, Commissioner Carns noted that the System would go "belly up." (Carns Depo. at 14:1-15:7; 51:3-12 (Oct. 22, 2008)).

[16]Apparently, the County hired Raftelis in an effort to excuse its default under Section 13.1(b) of the Indenture.

System. Over two and a half months have passed while the County has been "discussing" a contract with Raftelis and it expects it will take even more time to complete its negotiations (just to enter into a contract). To say that the County has not made retaining a rate consultant a priority would be a gross understatement.

The County has taken little if any action since the onset of this crisis to generate additional revenues. Its plan to use System revenues to hire yet another consultant to advise it on a number of items (on which it has already received sound advice from various other well-respected consultants) seems pointless when the previous advice it has received has been ignored. Since it is apparent that any professional advice given to the Commission with respect to System improvements falls on deaf ears, Plaintiffs can take little solace in the County's stated intention to use Raftelis. Moreover, the County has been given ample time to get its plan of action in order, but unfortunately the evidence of record shows the County has no viable plan. And while a complete resolution of the County's debt crisis will no doubt require action by parties other than the County, the County's full engagement in this process is a necessary and crucial piece of the puzzle needed to return the Sewer System to financial viability. As Plaintiffs have asked rhetorically: "How can the County (and this Court) expect the various parties in Montgomery, Washington, D.C. and New York to make the significant concessions that have been asked of them if the County will not do the things that are necessary to help itself?" The County has demonstrated that it is unwilling to make the hard and politically unpopular – but necessary – decisions to recover financially.

In addition, David Denard, Director of ESD, testified that the County makes no attempt to determine whether a particular expense should appropriately be characterized as an operating expense. Hearing Tr. 182:21-185:8 (Mar. 26, 2009). This has led to the improper classification of

a number of expenses, which has diverted substantial net revenues from the Sewer System and caused significant harm to Plaintiffs and the Warrant holders.

As discussed above, during the course of this litigation, the court appointed Special Masters who made substantial efforts to assist the County in overcoming its paralysis in dealing with the financial woes of its Sewer System. Among other things, the Special Masters prepared a report that contained a number of suggestions for the County to consider. Although the County asserts that it "has engaged fully in the [Special Master] process the Court crafted and is striving to resolve the sewer crisis" (Def. Br. at 12), that assertion is simply off the mark. The Commissioner responsible for the ESD not only pleaded "the Fifth Amendment" when asked if he supports the special master process, he also openly criticized one of the Special Masters in a press release. This was the case despite the fact that he only met with the Special Masters on one occasion for approximately twenty minutes and failed to discuss anything of substance with regard to the Special Masters' efforts to streamline the operations of the Sewer System. And ironically, the Special Master criticized was originally nominated by the Commissioners' counsel. There was no basis in fact or logic for the criticisms. Indeed, at the June 1, 2009 hearing, the Commissioner in question conceded that the Special Masters are not operating under any conflict of interest.

All counsel in this case have agreed that the Special Masters have been of great service to the parties and the court. For example, it was the Special Masters who initially observed the County is presently facing a budget shortfall of $17 to $20 million.[17] They have attempted to engage the

[17]With respect to this issue, Commissioner Carns' deposition testimony is straightforward and revealing: he was not aware that the County's ESD faced that large of a budget shortfall and neither he (nor anyone else with the County) has any plan in place to recoup the approximate $17 to $20 million revenue hole in the 2009 budget.

County regarding policy and operational improvements to the Sewer System, as well as mediate between the parties (and others) regarding a global resolution of this crisis. Their performance has been beyond superior.

Finally, as to the squandering of asserts, at the June 1 hearing, testimony was presented that established that there are a number of ESD customers who have received services for which they did not pay. In some circumstances, this had gone on for up to five or six years. Although the ESD is now attempting to recoup some of this lost revenue, the County has inexplicably decided to only seek payment for one year of unbilled service. This is clear evidence of the squandering of assets. Thus, there is ample evidence on which to base the conclusion that it is likely some assets will continue to be lost or squandered,[18] and the analysis of this factor weighs in favor of appointing a receiver.

3. Whether the Availability of Legal Remedies is Inadequate

The Warrants at issue are non-recourse debt. Thus, any judgment in this action must be paid from the sewer revenues which are undisputedly inadequate. If one thing in this case is abundantly clear, it is this: net sewer revenues have been (and still are) insufficient to support the Sewer System's debt service, even if that debt amount does not account for accelerated principal payments

[18]One more observation is in order. The court is unsure of the implications of the Commissioners' vote not to rescind a resolution to pull out of the region's Storm Water Management Authority ("SWMA"). The apparent effect of the vote is that the County will assume the salaries and benefits of 15 employees, at a cost of over $1,000,000, to perform tasks which, under the SWMA, cost the County approximately $400,000 per year. In explaining his position (opposing the position of Commission President Bettye Fine Collins), Commissioner Carns stated, "We can do that. I haven't worked all the details out yet, but we can certainly do it, ... I've got them worked out in my head, but I'm not ready to come forth with them right now." It is troubling that during a time when it does not have sufficient revenue to operate and service its debt, the County is taking on new employees and substantial expenses.

and higher interest rates caused by market factors and the downgrade of the County's insurers' ratings. Therefore, this factor also weighs in favor of appointing a receiver.

4. Whether there is a Probability that Harm to Plaintiffs by Denial of the Appointment of a Receiver would be Greater than the Injury to the Parties Opposing Such an Appointment

The County argues that it is implementing many of the recommendations of the Special Masters and that a receiver could not do a better job than the Commission of running the Sewer System. Its argument is principally supported by the testimony and opinions of those who have been and currently still are in charge of the Sewer System.

However, there is no evidence that the County, who opposes appointment of a receiver, would be harmed by the appointment of a receiver. The County has introduced evidence of the awards its Sewer System received for such things as its quality work in the clean water category. But the salient contention here is not that the County is failing to run a quality shop. Rather, the point is that the County is not administering the Sewer System in a fiscally responsible manner. Thus, although clearly the Commission is uncomfortable with the idea that it would lose some control over the Sewer System, there is nothing in the record to suggest it would be harmed by a receiver's better management of its administrative and financial operations.

To the contrary, a receiver would *enhance* the operational efficiencies of the Sewer System. He would maximize revenues, attempt to make the Sewer System a more streamlined operation, and help it pay its debts. Although the parties disagree as to whether a receiver should be appointed, they are in apparent agreement that John Young, one of the Special Masters, would be a good candidate for that position. Among other things, he has professional experience privately operating sewer systems. If he is not successful in that field, he, unlike the County, will be out of business. The

court fails to see how the appointment of someone with professional experience running a sewer system in the place of a five-member Commission with no such experience, would harm the County. Thus, the evidence on this factor weighs in favor of the appointment of a receiver.

5. Whether Plaintiffs Will Probably Succeed in this Action

Plaintiffs have alleged nine types of Events of Default and have presented evidence supporting each of their claims. Admittedly, the County has asserted defenses to some of these claims. As to the first alleged Event of Default, *i.e.* the County's failure to pay principal on the Warrants when due on each of June 2, 2008, August 1, 2008, October 1, 2008, January 1, 2009, February 20, 2009 and April 1, 2009, the County can hardly dispute that it did not make these payments in full. Nevertheless, the County attempts to dispute that these are Events of Default. According to the County, the fact that the insurers made these payments on its behalf somehow cures these Events of Default. This argument simply ignores Section 17.3 of the Indenture, "Miscellaneous Special Provisions Respecting the Bond Insurer and the Bond Insurance Policy," which provides in relevant part,

> (a) In determining whether a payment default has occurred . . ., no effect shall be given to payments made under the insurance policy.

Therefore, it appears that Plaintiffs will have probable success in litigating this Event of Default.

It is also undisputed that the County failed "to satisfy the Rate Covenant." The County argues this is not an Event of Default because it has employed "a utility system consultant to review the System and its existing rates and fees and [made] a good faith effort to comply with the recommendation of such consultant." Indenture Section 13.1(b). In January, the County passed a resolution essentially determining that it would not comply with the Rate Covenant. Not until mid-

March did it pass a resolution authorizing the hiring of a utility system consultant. However, the resolution only authorizes the County to hire the proposed utility consultant to "advise the Commission on the appropriate amounts for a. a fixed monthly fee for sewer service (to replace the current minimum monthly charge); b. impact fees; c. industrial surcharge and septage rates; and d. credit for residential customers for water not returned to the sewer system." (Doc. #72, Appendix 1.) Despite the fact that the resolution authorizing the hiring of a rate consultant was passed in March, testimony at the June 1, 2009 hearing established that the consultant had not yet been hired, and that some seventy plus days after the resolution passed, there is still no agreement as to the scope of work the consultant would perform. It was anticipated that the agreement on the scope of work would take approximately sixty more days. However, the Commission's resolution does not authorize the hiring of a utility consultant "to review the System and its existing rates and fees." The Commission's resolution appears to contemplate a much narrower role for this utility consultant. Moreover, at the June 1 hearing, the Commissioners made it quite clear that they would not consider raising rates. Based on this evidentiary record, the County cannot rely on Section 13.1(b) of the Indenture to excuse its failure to comply with the Rate Covenant.

As to other types of Events of Default, the County has repeatedly protested that a large portion of its financial woes were caused by the downgrade of the Insurers' credit ratings and, thus, these Events of Default should not be held against it. This argument suffers from at least three fatal flaws. First, the County voluntarily exposed itself to these risks when it replaced its fixed-rate financing with adjustable-rate financing. Second, this argument only applies to claims by the *Insurers*; the *Trustee*, also a plaintiff, is blameless in this regard. Finally, the record before the court makes it crystal clear that the County could not afford to pay back the initial amounts it borrowed

at the fixed rates it enjoyed even before it opted to venture into the variable and auction-rate market. For these reasons, the County's assertion is off the mark.

Based upon the evidence presently before the court, the court finds that Plaintiffs have a probability of success on the merits.[19] Therefore, this factor weighs in favor of appointing a receiver.

6. Whether the Interests of Plaintiffs and Others Will be Well Served by the Receivership

Frankly, analysis of this factor requires speculation. However, the evidence regarding the County's failure or refusal to act (or at best its glacial speed in acting) to resolve the issue of insufficient sewer revenues compels the conclusion that the interests of Plaintiffs and others may well be served by the appointment of a receiver.

7. Whether Equitable Principles Counsel Against Enforcing the Terms of the Indenture[20]

Facing the compelling evidence of Events of Default on its part, the County now argues that its contractual obligations should be ignored and equitable principles applied to deny Plaintiffs' enforcement of the express terms of the Indenture. The words of Judge Kristi Dubose in *Wachovia Bank v. Bon Secour Village, LLC*, Case No. 1:07-CV-00861-KD-C, pending in the Southern District of Alabama, are equally applicable here: "There has been no evidence presented to persuade the Court that the terms of the contract should be ignored in favor of equitable principles." (Southern

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[19]In fairness, the court is perplexed by the issue of whether Plaintiffs were required to present their receivership claim to the County pursuant to Alabama Code § 6-5-20. Indeed, that is the only factor that causes the court to hesitate in finding that Plaintiffs are likely to succeed on the merits of the receivership claim.

[20]The court distinguishes this question – whether equitable principles counsel against appointment of a receiver – from the separate issue of whether jurisprudential factors (*i.e.*, the doctrine of abstention) suggest such an appointment would be improper. The court addresses the latter issue *infra*.

District of Alabama Case No. 1:07-CV-00861-KD-C, Doc. #25 at 5). Rather, analysis of the relevant factors leads this court to the conclusion that a receiver should be appointed.

Having considered the appropriate factors and found that an analysis of the factors weighs in favor of the appointment of a receiver, and considering the fact that the County entered into agreements *twelve times* promising that a receiver would be an appropriate remedy in the event of default, the court concludes that Plaintiffs have presented sufficient evidence indicating their entitlement to this remedy.

Notwithstanding the court's findings of fact and conclusions regarding the availability of a receivership remedy, the County has raised significant arguments about this court's jurisdiction to impose that remedy. It is unfortunate that the County did not proffer these arguments earlier in this litigation. However, these jurisdictional issues cannot be ignored.

B. The Johnson Act Prohibits this Court from Exercising Jurisdiction to Appoint a Receiver with Rate-Making Powers

From the outset of this case, it has been clear that Plaintiffs clearly desire the appointment of a receiver who has the power to raise rates in order to maximize the Sewer System's revenues. In response to that particular request for relief, Defendants have argued that this court is precluded from exercising jurisdiction to appoint a receiver with the authority to affect sewer rates under the Johnson Act. The Johnson Act provides as follows:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
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> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
> (2) The order does not interfere with interstate commerce; and,
> (3) The order has been made after reasonable notice and hearing; and,

> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342. The Johnson Act "has been broadly construed to prohibit federal court actions that indirectly as well as directly affect rate orders." *Carlin v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986); *accord, e.g., U.S. West Inc. v. Tristani*, 182 F.3d 1202, 1207 (10th Cir. 1999) (Act "'broadly applied'" to prohibit "'challenges to orders affecting rates'") (quoting *Hanna Mining Co. v. Minnesota Power & Light Co.*, 739 F.2d 1368, 1370 (8th Cir. 1984)); *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053-54 (9th Cir. 1991) (Act "broadly construed" to bar "'all challenges affecting rates'") (quoting *Miller v. New York State Publ Serv. Comm'n*, 807 F.2d at 28, 31 (2d Cir. 1986)). Under this "effects test," the Act is inapplicable only when "the relief [the plaintiff] seeks, if granted, would not in any way affect the rates established" by the ratemaking authority. *Carlin*, 802 F.2d at 1356.[21]

"It is the general view that this Act requires all four conditions to be present before the Act can apply and thereby limit the court's jurisdiction." *DeKalb County v. Southern Bell Telephone and Telegraph Co.*, 358 F.Supp. 498, 504 (N.D. Ga. 1972), *aff'd*, 478 F.2d 700 (5th Cir. 1973) (citing *United States v. Public Utilities Comm. of Cal.*, 141 F.Supp. 168, 183 (N.D. Cal. 1956); *aff'd*, 355 U.S. 534 (1958)). It comes as no great surprise that the parties disagree about the application of the four conditions and whether the Johnson Act applies to bar this court from appointing a receiver with rate-making authority. Plaintiffs' arguments regarding the Johnson Act are somewhat of a moving target. As best the court can tell, however, they argue that the Johnson Act does not apply for several

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[21]Both Plaintiffs' demotion of *Carlin* to a footnote and their repeated refusal to engage the "effects test" that *Carlin* embodies (consistently with every other court of appeals to address the issue) are telling. (*See* Doc. #86 at 10 n.13).

reasons. First, they contend that because they are not challenging an order setting rates, but rather are seeking the appointment of a receiver to stand in the shoes of the County with respect to the enforcement of an order regarding rates, the Act does not apply.[22] Second, they argue that this matter is not in this court based solely on diversity jurisdiction in that they seek to enforce the 1996 Consent Decree resolving violations of the Clean Water Act. Third, they assert that the rate order at issue has an effect on interstate commerce because it affects the County's ability to make payments to Warrant holders who reside out of state. Finally, they argue that a plain, adequate and speedy remedy is not available in state court because in another case filed against Jefferson County (initiated on the same date as this case and discussed more fully below), all of the judges in Jefferson County recused themselves, and the Alabama Supreme Court has yet to assign the case to a judge who has not recused. They predict that the same result will occur in this case. For the reasons explained below, the court finds that each of these arguments are unavailing.

1. Plaintiffs' Claims and Their Requested Relief of the Appointment of a Rate-Making Receiver Implicate the Johnson Act

Plaintiffs argue that the Johnson Act does not apply because they claim they do not challenge or seek to enjoin an order affecting rates. They argue further, without citation to any applicable

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[22]Plaintiffs' Counsel: "We're not asking you to enter an order to set a rate or affect a rate ...."

The Court: "You're asking me to appoint a receiver to set a rate and affect a rate."

Plaintiffs' Counsel: "That's right."

(*Id.* at 18-19; *see also* Tr. of March 26 Hearing at 36-38). Plaintiffs make the same argument in their brief: "In appointing a receiver, the Court would not be enjoining a rate order, because the Court would not be changing rates, the receiver would." (Doc. #86 at 8).

authority, that if the relief they seek is granted, the receiver would merely step into the County's shoes with the ability to set rates.

The flaw in Plaintiffs' argument is this – the courts have recognized that the Johnson Act applies not only to frontal attacks on orders affecting rates, but also to "federal court actions that indirectly as well as directly affect rate orders, ..." *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1356 (11th Cir. 1986). Indeed, the Eleventh Circuit has indicated that it believes the Johnson Act has broad application. In *Marshall County Bd. of Educ. v. Marshall County Gas District*, 992 F.2d 1171, 1177 (11th Cir. 1993), the Eleventh Circuit did "not reach the question of whether the Johnson Act bars jurisdiction," but it nonetheless noted that "the unambiguous language of the statute expresses Congress' intent that federal courts should not interfere with a state's control over public utility rates." Plaintiffs seek to have this court impose *injunctive relief*, (*i.e.* the appointment of a receiver) upon Defendants which *would* have an effect on an order affecting rates (*i.e.* the Rate Ordinance). Specifically, Plaintiffs seek the appointment of a receiver with the power to raise rates and the power to impose other fees on Sewer System customers and even non-customers. In this Circuit (and others) the Johnson Act has not been given the narrow interpretation urged by Plaintiffs. Therefore, consistent with its remarks at the March 26 and June 1, 2009 hearings and its discussion below, the court finds that the Johnson Act applies to bar this court from imposing any injunctive relief which would affect sewer rates in any manner.[23]

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[23]In this case, the issue regarding rates is, at least in part, the fact that Defendants *have not* raised rates. Moreover, they *have not raised rates* even in the face of the 1997 Rate Order and Resolution which provides for annual automatic rate increases based on a specified formula which requires an increase in rates. To avoid a January 2009 rate increase, Defendants passed a resolution which had the effect of not complying with the Rate Order and Resolution. Plaintiffs seek injunctive relief, *i.e.*, the appointment of a receiver, who could step in and raise rates, either in compliance with the 1997 Rate Order and Resolution, or otherwise (in further contravention of the 1997 Rate Order

Based on the foregoing, it is crystal clear that the relief sought by Plaintiffs is injunctive and would have an effect on an order affecting rates. Therefore, the threshold issue of whether the Johnson Act applies is properly before the court. Further, analysis of "the other necessary conditions of the Johnson Act" reveals that they "are present to exclude jurisdiction." *DeKalb County*, 358 F.Supp. at 504.

a. Jurisdiction is Based Solely on Diversity of Citizenship

The next argument advanced by Plaintiffs to avoid application of the Johnson Act is that this action is not based solely on diversity. Rather, Plaintiffs have attempted to invoke federal question subject matter jurisdiction under the Consent Decree entered into on December 9, 1996. The argument is simply a thinly veiled attempt to skirt the Johnson Act. At the court's behest, albeit admittedly before the Johnson Act issues were raised, the parties entered into certain stipulations regarding undisputed matters in this case. Among the matters to which the parties stipulated is that Plaintiffs are *not* seeking the emergency appointment of a receiver under the Consent Decree. "At this time, the Plaintiffs are not asserting that a receiver is necessary to ensure the sewer system's compliance with the Consent Decree or Clean Water Act." (Doc. #75 at 12, ¶ 97). In the same filing, Plaintiffs also agreed that the court's jurisdiction had been invoked in diversity. (*See id.* at 29, ¶ 3). These stipulations are consistent with Plaintiffs' admission that they "are not seeking to enforce the terms of the Consent Decree." (Doc. #32 at 16, ¶ 147) (Plaintiffs' position)). Thus, Plaintiffs have previously stipulated (1) that they are not seeking to enforce the terms of the Consent Decree, (2) that they are not asserting that the appointment of a receiver under the 1996 Consent

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and Resolution). To the extent that this court appoints a receiver with the ability to affect rates, that injunctive relief *would have* an affect on the 1997 Rate Order and Resolution in that the receiver would either bring the County into compliance with that Order, or it will not.

Decree, and (3) that "the Court's jurisdiction has been invoked on diversity grounds." Given Plaintiffs' repeated stipulations – none of which Plaintiffs so much as mention in their briefing – it is simply not debatable that Plaintiffs' invocation of the Consent Decree has no place in the court's consideration of the Emergency Motion. Although Plaintiffs may not have been aware of the Johnson Act jurisdictional issue at the time they made those stipulations, that does not serve as a proper basis for allowing them to ignore (or escape) these stipulations.[24]

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[24]The stipulation entered into by the parties undercuts Plaintiffs' arguments, but that is not the only basis for concluding that this is a diversity case and nothing more. Simply stated, Plaintiffs lack standing to enforce the Consent Decree. (*See* Doc. #11 at 26-28; Doc. #31 at 20). First, in a previously field brief, Plaintiffs declined "to debate their standing to enforce the Consent Decree." (Doc. #34 at 19-20 n. 30). In their March 2009 brief – and in their post-hearing papers – Plaintiffs were conspicuously silent with respect to standing. (*See* Doc. #74 at 18-21) (discussing federal law but ignoring the Consent Decree); (Doc. #86 at 13-15) (discussing "jurisdiction" but never mentioning standing). And with good reason. Try as it might, the court has discerned *no* theory under which Plaintiffs in this case have the requisite stake in the quality of Jefferson County's water supply to sue on the Consent Decree – let alone seek an emergency receiver based on it. *See, e.g., Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1149 (2009) (plaintiff must demonstrate sufficient stake "'to warrant his invocation of federal-court jurisdiction'" (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (emphasis added in *Summers*).

Second, not only can Plaintiffs claim no stake in Jefferson County's water quality, but they have not – and cannot – allege that the County has violated the Consent Decree. By contrast, Plaintiffs concede (as they must) that "[a]t this point, the County is in compliance." (Tr. of March 26 Hearing at 23). Unfazed by these key concessions, Plaintiffs nevertheless argue that the County's actions "*threaten the prospect* that the County can continue to abide by the Consent Decree" and that "the County's defaults under the Indenture, unless cured, *may well* make current and future compliance impossible." (Doc. #79 at 8, 9; Doc. #86 at 14-25) (emphasis added). This type of speculation does not show the sort of imminence required under Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). Plaintiffs cannot ask for emergency relief on the basis of an agreement to which they are *not* parties and of which the County is *not* in violation. In addition, the Consent Decree cannot – and does not – provide the basis for the relief that Plaintiffs request – namely, the appointment of an emergency receiver to protect their alleged interests under the Indenture.

b. The Order at Issue Does Not Interfere with Interstate Commerce

Plaintiffs' argument that the order at issue, the 1997 Rate Order and Resolution, interferes with interstate commerce is misplaced and betrays a fundamental misunderstanding of the Johnson Act's "interstate commerce" condition. As the County correctly observes, Plaintiffs' contention is that the condition fails so long as there exists some "effect" on interstate commerce in the *Wickard v. Filburn*, 317 U.S. 111 (1942) sense – *i.e.*, so long as Congress could plausibly regulate under its Commerce Clause power. But the Johnson Act's interstate commerce condition cannot be construed so broadly, and that argument is in error. The Act's interstate commerce condition is concerned not with interstate "effects" in the *Wickard* sense, but rather with interstate discrimination and burdens in the *dormant* Commerce Clause sense. Indeed, on Plaintiffs' reading, it is difficult to imagine a utility rate order to which the Johnson Act would *ever* apply. Every rate order will presumably always have some "effect" on interstate commerce. Plaintiffs' loose construction of the interstate commerce condition, therefore, would take an Act that was fundamentally intended to get federal courts out of the local rate-making business and reconceptualize it so as to put them right back in the middle of it. "Generally, state agency orders setting intrastate [utility] rates do not interfere with interstate commerce." *US West, Inc. v. Nelson*, 146 F.3d 718, 724-25 (9th Cir. 1998) (citing *Kalinsky v. Long Island Lighting Co.*, 484 F.Supp. 176, 178 (E.D.N.Y. 1980) and *Zucker v. Bell Tel. Co.*, 373 F.Supp. 748, 751 (E.D. Pa. 1974), *aff'd*, 510 F.2d 971 (3rd Cir. 1975)). The Rate Order and Resolution itself merely purports to set rates charged to Jefferson County Sewer System customers - customers on a sewer system contained exclusively within Alabama.

> Certainly all state rate-making action does have some influence upon or effect upon interstate commerce but these actions do not necessarily interfere with interstate

> commerce and the magnitude of the harm threatened by inadequate intrastate rates does not provide a cause for ignoring the clear mandate of the Johnson Act.

US West, Inc., 146 F.3d at 724 (quoting *Louisiana Power & Light Co. v. Ackel*, 616 F.Supp. 445, 448 (D. La.1985) (citing *Kansas-Nebraska Natural Gas Co. v. City of St. Edward*, 234 F.2d 436 (8th Cir.1956) (holding that incidental and indirect effects on interstate commerce do not rise to the level of "interference" for purposes of the Johnson Act))).

What interferes with interstate commerce as it relates to this case is not the order at issue,[25] but rather the County's failure to pay its debt obligations under the various indentures into which it entered. It is that failure to pay, rather than the Rate Order and Resolution (which was designed to set the sewer rates for Jefferson County), which affects interstate commerce and Warrant holders outside of the state. The controlling question here is whether the "order" itself (as opposed to this litigation) "interferes with" (as opposed to merely "affects") interstate commerce. The answer is clear – it does not.[26] *See Kalinsky v. Long Island Lighting Co.*, 484 F.Supp 176, 178 (E.D.N.Y.

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[25]The arguments presented by Plaintiffs on this issue do not even address whether the relevant "order" – here, the Rate Order and Resolution – *itself* interferes with interstate commerce. Instead, Plaintiffs focus exclusively on the arguably interstate aspects of the current litigation. Plaintiffs point out that the Insurers and underwriters are "located outside of Alabama," and the Warrant holders "represent people and entities from around the country and world." (Doc. #86 at 15). Plaintiffs likewise stress that "this case" has "received national press coverage." (*Id.*). However, Plaintiffs never make any effort to tie their argument back to the Johnson Act's text – because they cannot. Under the Act, what matters is whether the "order" – not some larger piece of litigation, but the *order itself* – interferes with interstate commerce. Plaintiffs have not even addressed that question, let alone provided a convincing answer to it.

[26]As some of the leading commentators point out, the interstate-commerce condition serves the limited purpose of carving out dormant Commerce Clause challenges from the Act's broad prohibitive scope. *See* R. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 1172 (5th ed. 2003); *accord* 17 A. WRIGHT, A. MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 4236, at 234 (2d ed. 1997) (noting that interstate-commerce condition is "of doubtful meaning and limited importance"). A local utility's rate order "interfere[s] with" interstate commerce only where: (1) the order purports to regulate in a field preempted by Congress,

1980); *South Cent. Bell Tel. Co. v. Pub. Serv. Comm'n of Kentucky*, 420 F.Supp. 376, 377-78 (W.D. Ky. 1976). Therefore, the order at issue does not interfere with interstate commerce.

c. The Order Was Made after Reasonable Notice and Hearing

The question of whether the Rate Order and Resolution was made after reasonable notice and a hearing requires little discussion here. The Jefferson County Commission's customary practice is to give notice when it intends to modify rates and holds public hearings before it acts. The 1997 Rate Order and Resolution was adopted by the Jefferson County Commission in a public hearing. Therefore, this condition has been met.

d. A Plain, Speedy and Efficient Remedy May Be Had in the Courts of Such State

"Finally, assuming the first three conditions to be present, the Act prohibits federal jurisdiction when there is a remedy available in the state courts." *DeKalb County*, 358 F.Supp. at 504. "[T]he legislative history of the Johnson Act, ..., makes clear congressional intent that a state remedy is 'plain, speedy and efficient' even though [one] must proceed first through administrative and then judicial proceedings ... ." *California v. Grace Brethren Church*, 457 U.S. 393, 417 n.35 (1982) (citing S. Rep. No.125, 73d Cong., 1st Sess., 2-3 (1933)).

> To be "plain, speedy and efficient," the state remedy need only satisfy minimal procedural requirements. Succinctly put, the state remedy is "plain" as long as the remedy is not uncertain or unclear from the outset; "speedy" if it does not entail a significantly greater delay than a corresponding federal procedure; and "efficient" if the pursuit of it does not generate ineffectual activity or unnecessary expenditures of time or energy.

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see Pub Util. Comm'n of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943); or (2) the order applies to a commodity that has itself been shipped in interstate commerce and does so in a way that would discriminate against or burden the interstate shipment of that commodity. *See Nucor Corp. v. Nebraska Power Dist.*, 891 F.2d 1343 (8th Cir. 1989).

US West, Inc., 146 F.3d at 724-25 (citing *Brooks v. Sulphur Springs Valley Elec. Co-op.*, 951 F.2d 1050, 1054 (9th Cir.1991) (citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 517-21 (1981))).

Plaintiffs cannot assert that they lack an adequate remedy in state court. Without question, they could have filed a lawsuit in state court requesting the same relief they have requested here – contract damages and, more importantly for present purposes, a receiver. *See* Ala. Code § 6-6-620 *et seq.* Thus, Plaintiffs state-court remedy is materially identical to their federal-court remedy.

And, in fact, Plaintiffs do not complain about the adequacy of their remedy *per se*. They tacitly concede (as they must) that a breach of contract action is "plain" and that litigating novel questions of Alabama law in Alabama courts would be "efficient." Rather, Plaintiffs' argument rests entirely on their *assumption* that the state court in which they would file would be insufficiently "speedy." That argument fails for several reasons.

First, Plaintiffs complain about what they perceive will be a lack of dispatch with which the Jefferson County Circuit Court would act on their claims. Even assuming the accuracy of all of Plaintiffs' assumptions about how state-court proceedings might unfold, Plaintiffs have not shown a lack of "speed[]" in the Johnson Act sense. As the Supreme Court has held in a Tax Injunction Act[27] case, a delay of even years, while "regrettable," does not render a state court insufficiently "speedy." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 518-20 (1981). Plaintiffs' failure even to address – much less attempt to distinguish – *Rosewell* is telling. Plaintiffs are complaining about the prospect of a six-month delay; however, the Supreme Court did not find a delay four times that long to lack a sufficient speed.

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[27]The Tax Injunction Act, 28 U.S.C. § 1341, and the Johnson Act are companion provisions, and cases interpreting one are often cited as authority with respect to the other. *See, e.g., California v. Grace Brethren Church*, 457 U.S. 393, 410 n.22 (1982).